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No. 80-5887

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD H. WHITE,
PETITIONER,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION AND THE MASSACHUSETTS BAR ASSOCIATION AS *AMICI CURIAE*

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Interest of Amici Curiae

The Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association ("Lawyers' Committee") was founded in 1968 as the first local affiliate of the National Lawyers' Committee for Civil Rights Under Law. Since 1973, it has been sponsored by the Boston Bar Association and private firms. The Lawyers' Committee draws upon the resources of

over twenty Boston law firms to provide representation in civil rights and law reform cases on behalf of minorities and poor people in Boston. The Lawyers' Committee is currently handling cases in the areas of housing and urban development, bilingual education, school desegregation, racial violence, equal employment opportunity, police misconduct and the rights of children, prisoners and the developmentally disabled. These cases frequently require hundreds of hours of lawyer time, and continue, in the implementation phase, for many years. Because the Lawyers' Committee receives no public funding, fee awards from successful litigation, including awards under 42 U.S.C. § 1988, are becoming a significant income source for the Lawyers' Committee.

The Massachusetts Bar Association ("MBA"), a voluntary association incorporated in 1911, represents over 11,000 Massachusetts attorneys and individuals concerned with the administration of justice. The MBA has actively supported and has itself developed a number of *pro bono publico* projects. As part of its Lawyer Referral Project, the MBA has established a *Pro Bono* Panel of some 550 lawyers who have agreed to accept *pro bono* cases, as well as an Employment Discrimination Panel and a Disability Law Panel. These projects reflect the MBA's recognition of a vast, unmet legal need, and are designed to encourage the private bar to participate in cases brought on behalf of the poor, minorities and the disabled.

Amici believe that affirmance of the procedural limitation on attorneys' fee awards imposed by the Court of Appeals for the First Circuit will impair the ability of entities such as *amici* to enlist the resources of the private bar to meet the legal needs of the poor and the disadvantaged. This limitation will deprive many deserving plaintiffs and their counsel of fee awards in pending cases, and will discourage competent counsel from undertaking complicated and costly civil rights litigation in the future. Further, it will inject the fee issue into settlement negotiations, making settlement of civil rights cases more difficult and creating an ethical dilemma for plaintiffs' counsel.

For the reasons set out below and in petitioner's brief, the Lawyers' Committee and the MBA urge this Court to reverse the decision of the Court of Appeals.*

Summary of Argument

I. In holding that an application for attorneys' fees under 42 U.S.C. § 1988 was governed by the ten-day limitation of Rule 59(e) of the Federal Rules of Civil Procedure, the Court of Appeals for the First Circuit disregarded the plain language of the statute, which provides for allowance of attorneys' fees "as part of the costs". This Court has previously construed Section 1988 as an amended definition of costs applicable to civil rights cases, making attorneys' fees in those cases just another item of costs. *Hutto* v. *Finney*, 437 U.S. 678 (1978). The surprising result reached by the First Circuit finds no support in the legislative history of Section 1988 and will subvert the remedial objectives of the statute.

The First Circuit's reasoning is based on a fundamental misconception of the relation between Section 1988 and the pertinent Federal Rules of Civil Procedure. The First Circuit incorrectly assumed that the reference to "costs" in Rule 54(d) was limited to the type of costs allowable generally under 28 U.S.C. § 1920. However, it was well understood when Rule 54(d) was adopted that the costs to be awarded in a case would often be determined by reference to cost provisions in the particular statute under which the suit was brought. Moreover, the draftsmen of Rule 54(d) recognized that, in many instances, these provisions defined "costs" to include attorneys' fees. Section 1988 is merely another federal statute, comparable to those adverted to by the draftsmen of Rule 54(d) in their notes, which contains such a cost provision. The First Circuit's conclusion also runs counter to the mandate of Rule 58, for it requires determination of costs prior to entry of judgment, even though logically that determination must follow the entry of judgment and even though the inevitable result will be to delay the entry of judgments. Such delay is particularly harmful in civil rights actions, where plaintiffs are often seeking

* The parties' letters of consent to the filing of this brief are being filed herewith pursuant to Supreme Court Rule 36.2.

equitable relief to cure on-going violations of the law and where the entry of judgment must be followed by implementation of the remedy. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 723 (1974). Finally, the First Circuit misapplied Rule 59(e), which was designed to permit the correction of erroneous judgments, not to establish a time limitation on fee applications.

II. The First Circuit also erred because the very nature of the inquiry involved in determining fees is such that a fee application involves a matter supplemental to the original proceeding on the merits. Fee applications necessitate the submission of evidence unrelated to the merits and frequently require separate evidentiary hearings after the decision on the merits. A proceeding to determine fees is, therefore, collateral to and independent of the merits, and not subject to time limitations for modification of judgments or decrees. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). *Cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980). The First Circuit's attempt to distinguish *Sprague*, on the ground that it involved only a claim for fees against a common fund, misses the point, because the Court's reasoning in *Sprague* turned on the nature of the Court's inquiry, and not on the basis of the Court's power to make the award.

III. The rule adopted by the First Circuit would require the simultaneous negotiation of settlement of the merits and of the fee award, placing plaintiffs' counsel in an untenable ethical position. Conscientious plaintiffs' counsel would be required to forego a deserved fee award altogether or to accept less than an appropriate amount rather than jeopardize an acceptable settlement of their clients' claims on the merits. Numerous courts have directed that negotiation of fees be deferred until after settlement of the underlying claims. *E.g.*, *Prandini* v. *National Tea Co.*, 557 F.2d 1015 (3rd Cir. 1977); *Mendoza* v. *United States*, 623 F.2d 1338 (9th Cir. 1980). The First Circuit's decision is insensitive to this issue; its affirmation would invite defendants to extract a waiver of fees as the cost of settlement, thereby undermining the objectives of Section 1988 and discouraging private firms from bringing meritorious civil rights suits.

IV. The First Circuit's rule is impractical and its adoption would discourage settlements, delay the implementation of relief and waste limited judicial resources. Counsel cannot be expected to make a full evidentiary presentation on a fee request within ten days of judgment; consequently, entry of final judgment and any appellate proceedings may be delayed needlessly while the collateral issue of fees is resolved. Also, by injecting the fee issue into settlement negotiations, the rule would delay and possibly jeopardize the settlement of important civil rights actions. Further, the rule would result in a waste of judicial resources, because its adoption would mean that more civil rights cases will go to trial, and that unnecessary hearings on fees will be required in cases in which the judgment is ultimately reversed on appeal.

V. If it adopts the First Circuit's rule, this Court should apply the rule prospectively only. To apply the rule retroactively to pending cases which have gone to judgment, but in which no fee application was made within ten days, would unfairly deprive plaintiffs and their counsel of fees, when counsel had reasonably relied on the plain language of Section 1988 and the weight of precedent, including this Court's decision in *Hutto* v. *Finney*, *supra*, treating fees as an item of taxable costs. This Court has not hesitated to limit its decisions to prospective application if applying the decision retroactively would produce "inequitable results." *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969).

Argument

I. Rule 59(e) Does Not Apply to an Application for Attorneys' Fees Pursuant to 42 U.S.C. § 1988, Because Congress Directed That Such Fees Be Allowed as Part of the Costs.

In ruling that an application for attorneys' fees under 42 U.S.C. § 1988 after entry of judgment may be barred by Rule 59(e) of the Federal Rules of Civil Procedure, the First Circuit has transformed an application for costs specifically allowed by statute into a motion to amend judgment. As a result, even though the Federal

Rules of Civil Procedure impose no time limitations on applications for costs, the court has created, out of the ten-day limitation of Rule 59(e), a rigid, jurisdictional limitation on applications for costs pursuant to Section 1988, as least insofar as one item of the costs is attorneys' fees. This surprising result runs counter to the clear and unambiguous language of Section 1988 and is based upon a misconception of the pertinent Federal Rules of Civil Procedure. There is no evidence that Congress, in enacting Section 1988, contemplated such an anomalous result; on the contrary, the First Circuit's decision contravenes the letter and spirit of the statute.

A. *Congress Intended That Attorneys' Fees Under Section 1988 Be Allowed as an Item of Costs.*

To resolve the issue in this case, this Court need look no further than to the express language of the statute. Section 1988 could not be any more explicit: attorneys' fees are to be allowed "as part of the costs". This phrase must be attributed some meaning, and it is difficult to imagine that Congress's reference to the "costs" was intended to suggest anything other than the "costs" referred to in Rules 54(d) and 58 of the Federal Rules of Civil Procedure.

Relying on the plain language of the statute, most courts which have addressed the timeliness of a fee application under Section 1988 have concluded that fees are costs and that the time limitation of Rule 59(e) does not apply. *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980); *Van Ooteghem* v. *Gray*, 628 F.2d 488 (5th Cir. 1980); *Jones* v. *Dealers Tractor and Equipment Co.*, 634 F.2d 180 (5th Cir. 1981); *Johnson* v. *Snyder*, 639 F.2d 316 (6th Cir. 1981); *Bond* v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980); *Anderson* v. *Morris*, 500 F.Supp. 1095 (D. Md. 1980). *See also Fox* v. *Parker*, 626 F.2d 351 (4th Cir. 1980) (rejecting Rule 59(e) argument raised for first time on appeal, even though valid Rule 59(e) objection would be jurisdictional). *Contra*, *Hirschkop* v. *Snead*, 475 F.Supp. 59 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149 (4th Cir. 1981); *cf. Obin* v. *District 9, Int'l Ass'n of Machinists*

and Aerospace Workers, No. 80-1315 (8th Cir., filed June 11, 1981) (attorneys' fees under Title VII not "costs" under Rule 54(d), but not subject to Rule 59(e) because fee award is collateral and independent matter).[1]

Although this Court has not yet addressed this precise issue, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), the Court construed Section 1988 as authorizing an award of attorneys' fees as an element of "costs". In *Hutto*, the Court upheld a Section 1988 award of attorneys' fees requiring payment out of state funds, notwithstanding an assertion of Eleventh Amendment immunity by the State. Emphasizing Congress's direction in Section 1988 that fees be awarded as "part of the costs", the Court relied on the traditional rule that the Eleventh Amendment immunity did not apply to costs and, therefore, rejected the State's assertion. *Id.* at 693-698.

The First Circuit viewed *Hutto* as irrelevant to whether Section 1988 fees were taxable costs within the meaning of Rules 54(d) and 58. 629 F.2d at 703. Yet the Court's reasoning in *Hutto* was predicated on an interpretation of Section 1988 as having made attorneys' fees just another item of costs and consequently within the traditional Eleventh Amendment exception for costs. With reference to Section 1988, the Court reasoned that Congress could

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[1] The First Circuit cited a number of cases outside the context of Section 1988 in support of its decision. 629 F.2d at 700 n.4. Only one of these cases, however, involved a statute which authorized the allowance of attorneys' fees as "costs". *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979). This distinction is critical. *See* pp. 10-12, *infra*. The present authority of *Hill* is questionable, in view of the Sixth Circuit's decision in *Johnson* v. *Snyder*, *supra*. Also, in *Hill*, the application for fees came some twenty-eight months after the final judgment and a year after the completion of appellate proceedings; a delay of that magnitude may provide a basis for a discretionary denial of fees. *See* p. 16, n.14 *infra*.

Two other cases cited by the First Circuit, *Stacy* v. *Williams*, 466 F.2d 1366 (5th Cir. 1971) and *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951), have also been superseded by court of appeals decisions in those circuits under Section 1988. See cases cited in text. Also, in *Stacy* v. *Williams*, *supra*, the district court expressly acknowledged that attorneys' fees may be taxable as "costs" if a federal statute so provides, in which case Rule 59(e) would not apply. *Stacy* v. *Williams*, 50 F.R.D. 52, 55 (N.D. Miss. 1970). *See also Lichtenstein* v. *Lichtenstein*, 55 F.R.D. 535, 537 (E.D. Pa. 1972), *rev'd on other grounds*, 481 F.2d 682 (3d Cir. 1973), *cert. denied* 414 U.S. 1144 (1974).

"amend its definition of taxable costs and have the amended class of costs apply to the States". 437 U.S. at 696. Illustrating this point, the Court pointed to other statutes which provide for allowance of attorneys' fees as an item of costs, including the attorneys' fee provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), and the more limited attorneys' "docket" fee set forth in 28 U.S.C. § 1923. 437 U.S. at 697 and notes 28 and 29. There was no hint in this analysis that the Court viewed Congress's "amended definition of taxable costs" as pertaining only to Eleventh Amendment issues and not to the procedural treatment of costs in the Federal Rules of Civil Procedure.[2]

The legislative history of Section 1988 confirms that Congress intended no distinction between an award of attorneys' fees and other items of costs. The Senate Report, referring to fees as "like other items of costs,"[3] cited *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1926), a case upholding an order requiring that costs be paid out of state funds. The costs awarded in that case were traditional items such as those listed in 28 U.S.C. § 1920. Congress thus saw itself, in enacting Section 1988, simply as expanding the list of costs which could be assessed against a party after judgment.

More generally, the legislative history of Section 1988 shows that Congress's overriding intent in enacting the statute was to facilitate the private enforcement of the civil rights laws by encouraging competent attorneys, through assurance of a fee award, to undertake civil rights litigation. *See* S. Rep. No. 94-1011 at 2, 6; H.R. Rep. No. 94-1558 at 9; 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy); 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney); *Maine* v. *Thiboutot*, 448 U.S. 1, 9 (1980); *cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980). Recognizing the broad, remedial objectives of the statute, Courts have construed Section 1988 liberally to further its purposes.[4]

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[2] Indeed, the Court specifically referred to Rule 54(d) in describing the circumstances in which "costs" will be awarded against a State. *Id.* at 695, n.24.

[3] S. Rep. No. 94-1011, 94th Cong., 2d Sess., p. 5 (1976).

[4] For example, the legislative history shows that "the bill is intended to apply to all cases pending on the date of enactment." H.R. Rep. No. 94-1558, p. 4 n.6.

The rule adopted by the First Circuit is a rigid, technical obstacle to recovery of attorneys' fees under Section 1988. It has little in the way of policy or logic to commend it, and it serves only to create a trap for the unwary.[5] Its acceptance by this Court will hinder the conduct of civil rights litigation and can only discourage future suits by sending the clear message that plaintiffs' attorneys bear the risk of narrow and unexpected construction of Section 1988. This Court should reverse the First Circuit's decision and hold, consistent with Congress's intent, that Section 1988 fee awards may be allowed as "part of the costs".

B. *The First Circuit's Decision Is Based Upon a Misunderstanding of the Design and Purpose of Rules 54(d), 58 and 59(e).*

1. *Rule 54(a) does not limit costs to the items specified in 28 U.S.C.* § 1920.

The First Circuit viewed the issue before it as whether attorneys' fees under Section 1988 were within "the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54." 629 F.2d at 702. The Court began its analysis by quoting the provisions of 28 U.S.C. § 1920, which lists six traditional items of costs which may be taxed by a federal judge or clerk. The court then reasoned that attorneys' fees were "of a nature very different from" those costs, and, on that basis, concluded that attorneys' fees could not be treated as costs under Rule 54(d).

While the First Circuit's attempt to distinguish attorneys' fees under Section 1988 from items of costs listed in 28

Based on this statement, courts have applied Section 1938 to cases pending on appeal and, indeed, to cases in which the only unresolved issue is that of the fee award. *See Hutto* v. *Finney, supra*, at 694 n.23; *Fox* v. *Parker*, 626 F.2d 351, 354 (4th Cir. 1980); *Williams* v. *Alioto*, 625 F.2d 845, 849 (9th Cir. 1980); *Rainey* v. *Jackson State College*, 551 F.2d 672, 675-76 (5th Cir. 1977). Yet, if Rule 59(e) were applied, fees could not be awarded in any cases beyond the final judgment stage unless the appellate court directed that judgment be reopened.

[5] Even if counsel is aware of the rule, compliance may not be so easy. In major civil rights cases, given the many equitable decrees which may be entered and the likelihood of the district court's retaining jurisdiction to supervise implementation of its decrees, it may be less than clear whether or when "the judgment" was entered. Under the First Circuit's rule, if counsel errs in his or her interpretation, the chance to recover fees will be irretrievably lost.

U.S.C. § 1920 is debatable,[8] the fundamental fallacy in the First Circuit's reasoning lies in its assumption that the reference to "costs" in Rule 54(d) is limited to the type of costs included in 28 U.S.C. § 1920. On the contrary, Rule 54(d) was intended to permit recovery of whatever items of costs Congress might choose to identify, in particular statutes, as appropriate, under whatever circumstances Congress specified in those statutes. Indeed, as will be seen, it was well understood at the time of adoption of Rule 54(d) that Rule 54(d) would apply in cases where, under applicable statutes, attorneys' fees could be allowed as part of the costs. The enactment of Section 1988 represents simply another instance of Congress exercising its authority to supplement Rule 54(d) by specifying the items of costs recoverable in particular cases.

The draftsmen of Rule 54(d) recognized that a wide variety of federal statutes then in place addressed the matter of costs with

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[8] The First Circuit's emphasis on the "discretionary" and potentially controversial nature of an award of attorneys' fees is misleading. It ignores the fact that 28 U.S.C. § 1920 is itself discretionary, as is Rule 54(d). *See* 6 MOORE'S FEDERAL PRACTICE, ¶54.70[5] (1976). At the same time, a court's discretion in deciding whether to award attorneys' fees under Section 1988 is narrowly confined. The legislative history of Section 1988 made clear Congress's intent that the court's "discretion" in awarding fees was to be governed by the standard enunciated in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) — that is, that plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust". *See* S. Rep. No. 94-1011, p.4 (1976); H. Rep. No. 94-1558, p. 8 (1976). *See also* 122 Cong. Rec. 35128 (1976) (remarks of Rep. Sieberling) (fee award should be all but "automatic"); *Bond* v. *Stanton*, 630 F.2d 1231, 1233 (7th Cir. 1980); *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980); *cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980). The First Circuit ignored this principle, erroneously stating that "even to determine whether . . . [a fee award] should be made at all, the district court must evaluate possibly a dozen diverse factors." 629 F.2d at 702. This evaluation relates not to the question *whether* to award fees, but only to determination of the *amount* of the fee award.

More generally, an allowance of both attorneys' fees under Section 1988 and the costs referred to in 28 U.S.C. § 1920 represent reimbursement of expenses incurred by a party in litigating a case to judgment, as distinguished from an element of damages to be proven at trial as part of a cause of action. *See Hutto* v. *Finney*, *supra* at 695 n.24. They are all part of the costs of suit and, thus, do not differ in "nature", even if they may differ in magnitude or ease of calculation.

respect to litigation arising under those statutes. The Notes of the Advisory Committee on Rules, prepared at the time of adoption of Rule 54(d), set out an extensive list of federal statutes providing for allowance of costs in particular cases. Federal Rules 104 (West 1980 ed.). The predecessor of 28 U.S.C. § 1920 (28 U.S.C. § 830 (1940)) was listed as but one among some forty-five sections of the United States Code dealing with costs which were said to be among the statutes "unaffected" by Rule 54(d).

A review of the statutes identified by the Advisory Committee confirms that the draftsmen of Rule 54(d) anticipated that costs allowable in cases governed by the Federal Rules of Civil Procedure would, in many instances, include attorneys' fees. Of the twenty-five "statutes as to costs" listed in the final paragraph of the Advisory Committee's Notes, no less than twelve made provision for allowance of attorneys' fees as part of the costs.[7] Congress's decision to refer to attorneys' fees as part of the "costs" in so many federal statutes should be taken as a direction to the courts to follow the same procedures in awarding attorneys' fees as would apply to other items of costs.[8]

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[7] Among the more familiar statutes in the Advisory Committee's list providing for allowance of attorneys' fees as part of the costs were actions under the antitrust laws, 15 U.S.C. § 15; actions under the Securities Act of 1933, 15 U.S.C. § 77k; actions under the Securities Exchange Act of 1934, 15 U.S.C. §§ 77i(e) and 78r; and actions under the Communications Act of 1934, 47 U.S.C. § 206. The others are: 7 U.S.C. § 210f (Packers and Stockyards Act); 7 U.S.C. § 499g(c) (Perishable Commodities Act); 15 U.S.C. § 72 (Unfair Competition Act); 45 U.S.C. § 153p (Railway Labor Act); 46 U.S.C. § 829 (Shipping Act); 46 U.S.C. § 1227 (Merchant Marine Act); 49 U.S.C. §16(2) (Interstate Commerce Act).

[8] In some of these statutes, Congress expressly provided that fees would be "taxed in the manner usually provided for taxing of costs . . .," Securities Act of 1933, 15 U.S.C. § 77k, whereas in others it simply stated that "costs" included attorneys' fees. Clearly, neither Congress, in occasionally stating that fees shall be taxed "in the (same) manner" as other costs, nor the draftsmen of Rule 54(d), in referencing, without distinguishing among them, the statutes awarding fees as costs, saw any procedural impediment or logical incongruity to treating fees like any other item of costs awarded by the court. Rule 54(d), when adopted, applied *pro tanto*, to the award of fees as costs under at least twelve federal statutes; there is no reason to assume it does not also apply to the award of fees as costs mandated by federal statutes enacted after its adoption.

Thus, "costs" under Rule 54(d) may include attorneys' fees if a specific statute so provides. It is only in the absence of a specific provision for costs applicable to the cause of action that the matter of costs is left to 28 U.S.C. §1920. That statute provides a starting point for determining costs,[9] but does not limit the types of costs allowable under Rule 54(d); any other applicable statutes also must be consulted to determine whether, in the particular case, Congress intended that additional items, such as attorneys' fees, be included as part of the costs.

In this case, Section 1988 is just such a statute, as this Court recognized in *Hutto* when it referred to Congress's authority to amend the definition of taxable costs to include attorneys' fees. 437 U.S. at 696-97. The First Circuit's analysis, resting entirely on potential distinctions between attorneys' fees and the types of costs specified in 28 U.S.C. § 1920, represents a misunderstanding of Rule 54(d) and its relation to the panoply of federal statutes providing for and defining costs in particular cases.[10]

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[9] As one commentator has observed, "if costs are to be awarded under Rule 54(d), they very likely will include *at least* the . . . items listed" in 28 U.S.C. §1920. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2670 at 158-59 (1973) (emphasis added). *See also* Peck, Taxation of Costs in the United States District Courts, 37 F.R.D. 481, 494 (1965).

[10] In support of its analysis, the First Circuit cited *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, (1980). However, that case did not involve an award of attorneys' fees under Section 1988 to a prevailing civil rights plaintiff "as part of the costs". The issue in that case concerned the penalty which could be imposed against an attorney pursuant to 28 U.S.C. § 1927, where the attorneys' conduct "increase[d] costs unreasonably and vexatiously." The Court there concluded that the enactment of Section 1988 and its counterpart in Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(k), were not intended to expand the types of costs which could be charged against an attorney under 28 U.S.C. § 1927.

In *Roadway Express*, the Court construed the reference to "costs" in 28 U.S.C. § 1927 as limited to costs of the type set forth in the predecessor to 28 U.S.C. § 1920, based on the contemporaneous understanding of "costs" in 1813, when 28 U.S.C. § 1927 was first enacted, and in 1853 when it was re-enacted. This reasoning does not apply to the reference to costs in Rule 54(d), because, as discussed above, the "contemporaneous understanding" of Rule 54(d) at the time of its adoption was that "costs" may include attorneys' fees if a specific statute so provided.

Roadway Express is distinguishable on another ground. In that case, the Court had to decide whether Congress intended, by the enactment of the attorneys' fee

2. *Rule 58 contemplates the determination of costs after entry of final judgment.*

The First Circuit's decision cited, but did not discuss, Rule 58. That Rule, providing that "[e]ntry of the judgment shall not be delayed for the taxing of costs" is fundamentally at odds with the First Circuit's rule requiring that a fee award be treated as part of the judgment and subject to Rule 59(e).

The sentence quoted above was added to Rule 58 in 1946. Its purpose was to emphasize that "judgments are to be entered promptly by the clerk without waiting for the taxing of costs", notwithstanding certain local rules to the contrary. Notes of Advisory Committee on Rules, in Federal Rules 109 (West 1980 ed.). This change in the rule made it clear that "the entry of a judgment and the taxation of costs are entirely separate legal actions". *Maryland Cas. Co.* v. *Jacobson*, 37 F.R.D. 427, 430 (W.D. Mo. 1965).

The separation of costs from the judgment is only logical, for, by their nature, the costs of suit cannot be determined until after the suit is complete in all respects:

> Until final judgment, the incidence of costs is not determinable, and any attempt to adjudicate the correctness of the items, at the instance of one party, might be futile, since the moving party might not be adjudged, by the final judgment, to pay the costs.

Parkerson v. *Borst*, 256 F. 827, 828 (5th Cir. 1919). This principle is implicit in Rule 54(d), since not until final judgment can it be

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provisions, to create a new and potentially substantial liability for attorneys engaged in civil rights litigation, a liability which might be assessed against attorneys for *plaintiffs* as well as defendants. The Court noted that such liability could discourage the bringing of civil rights actions, contrary to Congress's intent, and therefore it was hesitant to so apply the statute in civil rights cases. But in this case, there is no danger that treating fee awards as part of the "costs" referred to in Rules 54 and 58 would frustrate Congress's intent. On the contrary, it is the result reached by the First Circuit which runs counter to Congressional intent.

determined who is the "prevailing party". *See* Wright & Miller, Federal Practice and Procedure § 2679 at 239. Indeed, for that reason, taxation of costs is often deferred until after appeal. *Popeil Bros., Inc.* v. *Schick Electric, Inc.*, 516 F.2d 772, 777 (7th Cir. 1975); *Brennan* v. *Frisch Dixie, Inc.* 61 F.R.D. 419, 420 (W.D. Ky. 1973), *aff'd* 492 F.2d 1243 (6th Cir. 1974); *Fleischer* v. *A.A.P., Inc.*, 36 F.R.D. 31, 33 (S.D.N.Y. 1964).

This background shows that taxation of costs generally follows the entry of final judgment rules not, as asserted by the First Circuit, because costs are routine and noncontroversial, but rather, because, as a matter of sound judicial administration, it makes no sense to address the issue of costs until after final judgment. This reasoning applies with particular force to an award of fees under Section 1988.

As with many items of litigation expense, attorneys' fees under Section 1988 cannot finally be determined until the case is complete and judgment has been entered.[11] If the defendant appeals, the "prevailing party" issue may not be resolved until the completion of appellate proceedings. *See Anderson* v. *Morris*, 500 F. Supp. 1095, 1105 (D. Md. 1980). And, since a prevailing civil rights plaintiff is entitled to an award of fees for the appeal (*e.g.*, *Morrow* v. *Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978)), the total amount of the fee award cannot be determined before then.

Adoption of the First Circuit rule effectively reverses the order of judicial action contemplated by Rule 58 by pushing the award of costs *ahead* of entry of judgment. As a practical matter, the result will be to postpone the entry of judgment, contrary to the letter and purpose of Rule 58. *See Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580, 582 (3d Cir. 1960); Wright & Miller, Federal Practice and Procedure § 2785 at 18. As discussed in Part IV, any delay in entering judgment in civil rights cases is significant, for plaintiffs typically seek injunctive relief to remedy on-going violations of the law. Postponing entry of the judgment not only delays

[11] Interim fees, however, may be awarded *pendente lite*. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 722 (1974); S. Rep. 94-1011, p. 5 (1976).

the effectiveness of the court's order but also delays its implementation and enforcement. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 723 (1974) (noting that implementation of a school desegregation plan should not be deferred to await an application for and hearing on attorneys' fees). Contrary to the result required by the First Circuit, determination of fee awards should ordinarily *follow* entry of judgment, in accordance with the mandate of Rule 58.[18]

3. *Rule 59(e) was never intended as a time limitation on applications for attorneys' fees.*

The effect of the First Circuit's decision in this case is to turn Rule 59(e) into a time limitation for the filing of fee applications in civil rights cases. The draftsmen of Rule 59(e) never conceived of Rule 59(e) as serving this function. The provision was added to Rule 59 in 1946 — at the same time Rule 58 was amended — simply to confirm that a federal judge had power to alter or amend a judgment after its entry, an issue which had recently arisen in the Eighth Circuit in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944). *See* Notes of Advisory Committee on Rules, in Federal Rules 110 (West 1980 ed.).

There is no justification for applying Rule 59(e) to fee applications under Section 1988. Rule 59(e) only makes sense here if one assumes that the fee award *should* have been included in the judgment, and the judgment is being amended to correct an error or oversight. Yet the fees allowed under Section 1988 are not compensation for the injury giving rise to the action and, thus, they are not an element of a cause of action to be proved at trial. *See Hutto* v. *Finney*, *supra* at 695 n. 23; *Bond* v. *Stanton*, *supra*, 630 F.2d at 1233. As the court explained in *Knighton* v. *Watkins*, 616 F.2d 795, 797 (5th Cir. 1980):

[18] This approach is not without precedent. In England, where costs have traditionally included attorneys' fees, a separate hearing on attorneys' fees is held "after the litigation of substantive claims has terminated". *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 n.18 (1975); *see* Goodhart, Costs, 38 YALE L.J. 849, 855 (1929).

> a motion for attorneys' fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e).

Furthermore, as noted above, the attorneys' fees to be allowed under Section 1988 encompass not only legal expenses incurred in obtaining the judgment, but also compensation for the cost of appellate proceedings and even the cost of making application for fees. *See Morrow* v. *Dillard*, *supra*, 580 F.2d at 1300; *Bond* v. *Stanton*, *supra*, 630 F.2d at 1235. A rule requiring that a plaintiff apply for fees within ten days after entry of final judgment would preclude the district court's award of fees of this type. Such a rule is illogical and was never intended by the draftsmen of Section 1988.

The First Circuit's suggestion that application of Rule 59(e) furthers the goal of "finality" (629 F.2d at 804) ignores the reality of civil rights litigation. This type of litigation often continues for years after the entry of "final judgment," to ensure implementation and enforcement of an equitable decree.[13] The ten-day cut-off of Rule 59(e) makes little sense in this context, and, if applied, could jeopardize fee awards in such further proceedings.

Had Congress intended to impose a strict time limitation on the filing of fee applications in civil rights cases, it could easily have included such a provision in Section 1988. But, in the absence of such language, there is no basis for treating a rule relating to the correction of erroneous judgments as defining a time limitation for filing fee applications under Section 1988.[14]

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[13] For example, in *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972), proceedings before the district court are continuing some nine years after entry of the court's decree.

[14] The Federal Rules of Civil Procedure contain no specific time limitation for an application for costs, be they attorneys' fees or any other item of costs. A strict, arbitrary time limitation makes little sense, when it is frequently desirable to defer the matter of costs until after the completion of appellate proceedings. This is not to say, however, that the courts lack power to impose some limitations. Ordinarily, cases should not remain open indefinitely, and a lengthy and unjustified delay in filing for costs may provide grounds for the district court, in the exercise of its discretion, to deny an award of costs. *E.g.*, *United States* v. *Pinto*, 44 F.R.D. 357

II. An Application For Attorneys' Fees Under Section 1988 Is A Collateral And Independent Proceeding Which Is Not Subject To Rule 59(e).

If attorneys' fees under Section 1988 are not treated as an item of "costs" under Rule 54(d), neither can they be treated as an item of damages, to be proven at trial. The procedures which have evolved for determining a fee award require a separate proceeding, which may include an evidentiary hearing, in which the issues before the court are largely unrelated to the issues at trial. For these reasons, an application for attorneys' fees under Section 1988 constitutes a collateral and independent proceeding which is not subject to the limitations on amendments to judgments imposed by Rule 59(e).

The very distinctions which the First Circuit drew between fee awards and more traditional costs underscores the special nature of an application for attorneys' fees. As the court observed, proceedings concerned with fee awards require the district court to evaluate a dozen diverse factors. *E.g.*, *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied* 438 U.S. 916 (1978). Moreover, "the district court is generally assisted by submissions from the parties and frequently finds it necessary . . . to hold a hearing on the matter." 629 F.2d at 702.

A proceeding limited to determination of a fee award is exactly the sort of proceeding which traditionally has been viewed as "collateral" to and "independent" of the merits of the case. The doctrine had its origin in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), which, just like this case, concerned the timeliness of a claim for attorneys' fees. In *Sprague*, the petitioner had filed a separate petition for allowance of attorneys' fees, well after entry of final judgment on the merits of the case. The Court overruled the decision of the Court of Appeals for the First Circuit, which

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(W.D. Mich. 1968). The equitable doctrine of laches may be useful here; unless the defendant can show substantial prejudice, an otherwise proper award should not be denied. In general, a plaintiff should be afforded a reasonable period to apply for Section 1988 fees after all aspects of the case have been resolved or settled, and, if there are active efforts to settle the fee issue, this period should continue until after those efforts have terminated.

had held that the district court was powerless to act because petitioner had failed to assert the claim for fees within the period then permitted in equity suits for modification of the original decree. 307 U.S. at 169-70. The Court held:

> Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Court of Appeals — that it came after the end of the term at which the main decree was entered and therefore too late — falls.

Id. at 170.

The First Circuit attempted to distinguish *Sprague* as limited to the award of attorneys' fees in the so-called "common fund" cases. However, this Court's opinion in *Sprague* addressed two entirely separate issues: first, whether the federal court had *power* to allow attorneys' fees in the circumstances of the case, and second, whether the request for such fees was untimely. The Court's analysis of the second point did not depend on the source of the district court's power to award attorneys' fees. Instead, the Court, citing *Internal Improvement Fund* v. *Greenough*, 105 U.S. 527 (1882), emphasized that, in deciding whether to award fees, the district court's "inquiry was a collateral one, having a distinct and independent character." 307 U.S. at 169. The Court also observed that determination of the fee issue is placed "in much better perspective after the final disposition . . . including appeal", of the litigation. *Id.* The Court's reasoning was thus based on the nature of the inquiry, not the underlying basis for the fee award. The collateral and independent nature of that inquiry is no less true in the case of a fee application under Section 1988.

Following the reasoning of *Sprague*, the Court of Appeals for the Eighth Circuit has very recently held that a motion for attorneys' fees under Section 1988 "should be treated as a matter collateral to and independent of the merits of the litigation", so that Rule 59(e) does not apply. *Obin* v. *District 9, Int'l Ass'n of*

Machinists and Aerospace Workers, No. 80-1315 (8th Cir., filed June 11, 1981) (slip op. at 17). The court of appeals expressly rejected the First Circuit's analysis in this case, pointing out that "the same characteristics relied upon by the *White* court to distinguish fees from costs also distinguish fees from the merits of the action." Slip op. at 13-14.[15]

Although this Court has not yet had occasion to apply the *Sprague* rule to a claim for attorneys' fees under Section 1988, the Court's recent decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980) lends support to this approach. In *Carey*, the Court held that a Title VII plaintiff who prevailed in state administrative and judicial proceedings was entitled to an award of attorneys' fees in the United States District Court under the Title VII counterpart to Section 1988,[16] even though all aspects of the federal action were dismissed except the request for attorneys' fees. The Court concluded that Title VII's authorization of a civil suit in federal court "encompasses a suit solely to obtain an award of attorneys' fees for legal work done in state and local proceedings". *Id.* at 66. The Court thus viewed the proceeding to obtain attorneys' fees as entirely independent of the merits of the suit,

[15] While rejecting the application of Rule 59(e), the Eighth Circuit expressed its preference for considering appeals on fee questions together with any appeal from a final judgment on the merits. To this end, the court suggested that the district courts adopt rules requiring the filing of requests for attorneys' fees within twenty-one days after entry of judgment, so that the issue could be promptly decided and any appeals consolidated with appeals on the merits. However, such a rule would create the same practical problems as application of Rule 59(e)'s ten-day limitation and would result in a rigid procedural bar to recovery of fees. Furthermore, as discussed in Part I, in many cases the preferable procedure will be to defer the complicated fee analysis until after the completion of appellate proceedings. *See Sprague* v. *Ticonic Nat. Bank*, *supra* at 168; *Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980). Because the issue of fees is so different from the merits, there is less reason to be concerned about piecemeal appeals. In any event, in the context of fee awards, piecemeal appeals may simply be inevitable, given that fees for appellate proceedings cannot be fixed until after the completion of those proceedings, and that further fee awards may be made if the court retains jurisdiction to oversee implementation of its decree.

[16] Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). The Court referred to this provision and Section 1988 as "similar in purpose and design". *Id.* at 70 n.9.

which had been litigated in another forum. Following this reasoning, an application for fees under Section 1988 clearly may be considered in a proceeding collateral to and independent of the merits, and should not be treated as a request for a modification of the judgment on the merits.[17]

III. The Rule Adopted By The First Circuit Will Require That Settlement Negotiations Encompass Both Attorneys' Fees And The Merits, Creating Conflicts Of Interest And Undermining The Federal Policy Embodied In Section 1988.

The rule adopted in this case by the First Circuit has profound and disturbing implications for civil rights litigants and counsel who represent them. Some of the problems created by the rule were alluded to in Part I of this brief; others are discussed in greater detail in this and the following section. *Amici* urge the Court, in construing and applying Section 1988 in the present case, to be mindful of the significant practical and policy considerations which militate against adoption of the First Circuit's rule. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975).

One problem greatly exacerbated by the First Circuit's decision is the ethical dilemma faced by counsel for civil rights plaintiffs during settlement negotiations if counsel engage in simultaneous negotiation of both a consent decree and a fee award. There has been increasing recognition that such simultaneous negotiation

[17] The First Circuit interpreted the phrase "In any action or proceeding" in Section 1988 as a strong indication that the fee issue is properly viewed as "belonging within the main body of the already commenced civil rights action." 629 F.2d at 704. The statute involved in *Carey* used the identical language, yet the Court there did not require determination of the fee issue as part of the main body of the proceeding on the merits. The First Circuit did not cite *Carey* and apparently did not consider its implications.

tends to create a conflict of interest between attorney and client.[18] The conflict arises particularly in civil rights cases, where, as a practical matter, "a motion for fees and costs . . . , although made in the name of the plaintiff, is really one by the attorneys". *Regalado* v. *Johnson*, 74 F.R.D. 447, 451 (N.D. Ill. 1978).

The effect of the First Circuit's decision is to guarantee that this ethical problem will arise in every civil rights case in which settlement is even a possibility. The First Circuit itself saw its rule as "requiring the parties to face up to the issue of fees in their settlement negotiations." 629 F.2d at 705. According to the First Circuit, failure to confront the issue "merely muddies the waters". *Id.*

The First Circuit simply ignored the practical and ethical implications of its rule. *Amici* have found that, when the fee issue is injected into settlement negotiations, counsel for defendants frequently exploit the ethical dilemma faced by plaintiffs' counsel by offering a settlement which may satisfy plaintiffs' needs but is insufficient to adequately compensate counsel. Defendants' counsel may specify a very low amount for the fee, or may condition a settlement offer on counsel's complete waiver of fees. Civil rights litigation is particularly vulnerable to this tactic, for often the plaintiffs seek only injunctive relief, and the settlement offer may involve very little expense on the part of defendants, yet be perfectly acceptable to the plaintiffs. In these circumstances, plain-

[18] *See Mendoza* v. *United States*, 623 F.2d 1338, (9th Cir. 1980); *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1020-22 (3d Cir. 1977); *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 425-26 (7th Cir. 1977); *Lyon* v. *Arizona*, 80 F.R.D. 665, 667-69 (D. Ariz. 1978); *Regalado* v. *Johnson*, 79 F.R.D. 447, 451 (N.D. Ill. 1978); *Jamison* v. *Butcher & Sherrerd*, 68 F.R.D. 479, 484 (E.D. Pa. 1975); *City of Philadelphia* v. *Charles Pfizer & Co.*, 345 F.Supp. 454, 470-71 (S.D.N.Y. 1972); *Norman* v. *McKee*, 290 F. Supp. 29, 36 (N.D. Cal. 1968), *aff'd* 431 F.2d 769 (9th Cir. 1970); *see also* MANUAL FOR COMPLEX LITIGATION, § 1.46 at 74 (2d Ed. 1980) ("When counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest."); *see generally* Levin, Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in which Statutory Attorney's Fees Are Authorized, 14 CLEARINGHOUSE REV. 515 (1980); Developments In the Law — Class Actions, 89 HARV. L. REV. 1318, 1606-8 (1976).

tiffs' counsel is forced into a bargaining position inimical to the dictates of the Code of Professional Responsibility. Canon 5 of the Code imposes a duty on counsel to act solely for the benefit of the client, free of conflicting loyalties and compromising influences. *See* DR 5-101(A) (prohibiting acceptance of employment where lawyer's personal economic interests may reasonably affect the exercise of professional judgment on behalf of client); DR 5-103(A) (generally prohibiting lawyers from acquiring interest in litigation); *cf.* DR 5-107(A)(2) (prohibiting lawyers from accepting anything of value from third parties relating to representation of client). *See also* EC 5-1, 5-2; Canon 9 (lawyer "should avoid even the appearance of impropriety").

It is *amici*'s experience that, faced with this dilemma, responsible counsel conclude they have no choice but to accept the settlement offer, notwithstanding the inadequacy of fees or the forced waiver of fees. The First Circuit had no problem with this outcome, pointing out that plaintiffs' counsel may, rather than holding out against their clients' best interests, decide to "waive fees altogether." 629 F.2d at 705. But this result subverts Congress' intent that fees be awarded in order to attract competent counsel who will bring civil rights cases. *See* p. 8, *supra*. These cases are often complex, lengthy and very costly. Before agreeing to handle major civil rights litigation likely to involve a significant and long term commitment of resources, private law firms carefully evaluate the chances of prevailing on the merits and recovering fees. The prospect of simultaneous negotiation of fees and the merits, which predictably will result in reduced fees or no fees at all, will have a major impact on *amici*'s efforts to find firms which are willing to make that commitment.[19]

[19] Conversely, counsel for a defendant might offer to pay plaintiffs' counsel a lucrative fee, while offering less than adequate relief to the plaintiffs. One hopes that plaintiffs' counsel would not knowingly compromise the interests of his or her clients, but any time the fee offered is substantial, there may be an *appearance* of impropriety in accepting the offer. One court has disapproved concurrent negotiation of fees and the merits because of the "unfortunate impression that defendants [were] buying themselves out of a lawsuit by direct compensation to plaintiffs'

The only alternative suggested by the First Circuit, other than waiver of fees, was an agreement by the parties to submit the matter to the court for later determination. This suggestion is unrealistic. Given the choice, a defendant will always prefer the certainty of resolving the fee issue as part of an overall settlement rather than leaving it for later determination. Moreover, a defendant has no incentive to agree to this approach as long as there exists the possibility of forcing plaintiffs' counsel to accept reduced fees as a condition of settling the merits.

The only real solution to this problem is adoption of rules to discourage the simultaneous negotiation of fees and the merits. A number of courts have recently done just that. In *Prandini* v. *National Tea Co.*, 557 F.2d 1015 (3rd Cir. 1977), the Third Circuit decided that a

> reasonable solution . . . is for the trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation for attorneys begin.

Id. In *Mendoza* v. *United States*, 623 F.2d 1388 (9th Cir. 1980), the Ninth Circuit extended the *Prandini* rule to an action seeking injunctive relief, recognizing that the conflicts involved do not disappear where "there is no fund or money damages being negotiated." 623 F.2d at 1352. The *Mendoza* court concluded by "strongly discouraging the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations." *Id.* at 1353. *See also Regalado* v. *Johnson*, *supra*; *Lyon* v. *Arizona*, 80 F.R.D. 665, 667-69 (D. Ariz. 1978); *Munoz* v. *Arizona State University*, 80 F.R.D. 670, 671-72 (D. Ariz. 1978); *cf.*, *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977) (recommending but not requiring *Prandini* procedure).

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counsel." *Jamison* v. *Butcher & Sherrerd*, 68 F.R.D. 479, 484 (E.D. Pa. 1975). *See also Franks* v. *Kroger Co.*, 26 EPD ¶31876, 25 FEP Cases 1750 (6th Cir. 1981); *Foster* v. *Boise-Cascade, Inc.*, 420 F.Supp. 674, 686 (S.D. Tex. 1976).

The First Circuit disapproved a bifurcated procedure apparently out of concern for cases in which the matter of fees would go unmentioned in the settlement but then be raised unilaterally after entry of the consent decree. 629 F.2d at 705. The implication was that defendants ought to be protected from wily plaintiffs' lawyers, who would trick them into a consensual entry of judgment and then, out of the blue, move for an award of fees, perhaps in a very substantial amount. But this scenario can rarely, if ever, occur, and, in any event, the First Circuit's rule does not resolve the problem if it does exist.

As an initial matter, it is hard to believe that defendants' counsel can be imposed upon in this manner. A cursory review of the law will reveal to anyone that defendants are liable for fees under Section 1988 even after a settlement of the case. *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980); S. Rep. No. 94-1011, p. 5; *see* Annot., 43 A.L.R. Fed. 243, 285-89 (1979). There is no reasonable basis for a defendant to assume that a consent decree which does not mention fees implies a waiver of fees. *See Regalado* v. *Johnson*, *supra* (refusing to construe consent decree silent as to fees as agreement for no fees).

Furthermore, if counsel for plaintiffs intended all along to "trick" defendants' counsel, the First Circuit's rule would not remedy the problem. Plaintiffs' counsel could still obtain entry of the consent decree, and then, within ten days, move for a fee award.

More generally, any confusion as to the implications of a consent decree which is silent as to fees exists only because the procedures for negotiation of the merits and fees are not clearly delineated. In the present case, the Court has the opportunity to make clear that the matter of fees may be deferred until after entry of judgment, and that, where the case is settled, resolution of the fee issue *should* be deferred until after entry of the consent judgment. The Court will thus eliminate confusion as to the implications of a consent decree, remove the ethical dilemma faced by plaintiffs' counsel, and assure that the salutary purposes of Section 1988 will be effectuated.

IV. The Rule Adopted by the First Circuit Is Impractical and Will Discourage Settlement, Delay Final Resolution of the Merits and Waste Judicial Resources.

Apart from the ethical dilemma created by the First Circuit's rule, the rule is impractical and contrary to sound judicial administration. It is inconceivable that Congress could have intended these results in enacting Section 1988.

Adherence to the rule will impose substantial burdens on plaintiffs' counsel. Ordinarily, counsel would not expect to prepare a fee application prior to judgment. Since fees may be recovered only by "prevailing parties", it is wasteful of lawyers' time to prepare the necessary submissions before the outcome is known. Although counsel may be allowed fees for time spent in preparing these submissions, no fees at all will be allowed if plaintiffs lose on the merits. Also, there may be cases in which is is less than clear whether plaintiffs "prevailed". In those circumstances, the lawyers and their clients should have an opportunity to confer on whether to apply for fees at all.

Assuming the judgment is favorable and the decision is made to proceed with a fee application, counsel will have, if the First Circuit rule is adopted, only ten days to submit papers in support of the application. Counsel will need to prepare and file, within that time frame, a motion, supporting affidavits (addressing such matters as the time and labor required, the nature of the fee arrangement, the customary fee, and a multitude of other factors) and a legal memorandum. *See King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977). These materials must include "a full and specific accounting" of time, indicating the "dates and the nature of the work performed during the hour or hours in question." *Id.* at 1027.

Ten days is not sufficient time to confer with clients and compile these materials. Obtaining detailed time reports in that period may be an administrative impossibility for large private firms, especially if many lawyers have worked on the case and judgment is entered soon after trial. Furthermore, during that same period, plaintiffs' counsel will need to analyze the judgment itself and may

need to file a "true" motion to amend the judgment pursuant to Rule 59(e). Imposition of these burdens will make it more difficult to obtain fee awards and can only discourage attorneys from undertaking these cases in the first place.[20]

Adoption of the First Circuit's rule will also impose an obstacle to settlements. Injecting a potentially divisive issue like fees into settlement discussions on the merits will make negotiation of a consent decree more difficult, particularly if defendants refuse to consent to entry of a decree until the fee issue is resolved. Because civil rights litigation typically involves an effort to obtain injunctive relief, delays in achieving a settlement and in implementing a decree while the parties discuss fees may be of far-reaching significance. And, if the result of a controversy over fees is no settlement at all, the case will have to go to trial and the injunctive relief sought will be deferred.[21]

The First Circuit's rule will also delay the final resolution and implementation of litigated judgments. Because the rule encourages courts to enter a single, unified judgment, some courts may put off entry of a decree on the merits until the fee matter is heard and resolved, contrary to the principles embodied in Rule 58 and contrary to this Court's mandate that implementation of injunctive relief in civil rights cases must not be deferred to await resolution of fee issues. *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 723. And, even if judgment is entered prior to counsel's application for fees, a Rule 59(e) motion, followed by a hearing

[20] The First Circuit's rule could be construed as requiring only that a motion, without supporting papers, be filed within the ten-day period. If so, the burden on counsel is naturally less, but then the rule serves only a notice function, which is unnecessary since defendants are already on notice of Congress's intent that fees be awarded almost as a matter of course. Consequently, the rule would end up as nothing more than a trap for the unwary.

[21] In cases which are tried and in which plaintiffs prevail, the interests of the parties and of the courts are best served by negotiation of a settlement of the fee award. But such a settlement cannot be accomplished within the ten days after judgment. Accordingly, counsel will have no choice but to submit a prompt fee application in each case, thereby increasing their own costs and hardening their position with respect to settlement.

and eventual decision on the fee issue, will delay any appeal on the merits and defer the final resolution of the case. *See* Fed. R. App. P. 4(a)(4).

Finally, adoption of the First Circuit's rule will impose an increased burden on limited judicial resources. Because the rule discourages settlements, more cases will go to trial. Also, the rule will lead to an increased number of fee applications, since protective filings will have to be made before the question whether to file can be thoughtfully reviewed. And, once they are filed, fee applications are more likely to be pursued. The court will have to address the fee question both before and after appeals, even though the appeal may moot the issue altogether. *E.g.*, *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979). Finally, if fees are allowed following an appeal, there may be yet another appeal on the fee award. Plainly, sensible judicial administration dictates that fees not be confused with the judgment on the merits, so that the issue of fees may be addressed economically and efficiently at the appropriate time.

V. If the First Circuit Rule Is Adopted, It Should Not Be Applied Retroactively.

If this Court adopts the First Circuit's rule, the rule should be applied prospectively only, in order to avoid substantial hardship to plaintiffs and their attorneys who reasonably assumed that fees could be allowed after judgment as "part of the costs".

On a number of occasions, this Court has tempered the harshness of new procedural rules by invoking the doctrine of nonretroactive application. *E.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). As the Court observed in *Cipriano*,

> Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

395 U.S. at 706.

In the present circumstances, application of the rule to pending cases which have moved beyond the entry of judgment will result in a forfeiture of attorneys' fees which would otherwise be allowed under Section 1988. It is fair to assume that the decisions of the courts of appeals for the fifth, sixth and seventh circuits have encouraged lawyers to defer fee applications until the appropriate time for assessment of costs. Indeed, the fact that only the First Circuit has applied Rule 59(e) to fee applications confirms that adoption of its rule has not been "clearly foreshadowed". *See Chevron Oil Co.* v. *Huson, supra* at 106. On the contrary, the very language of Section 1988, and this Court's discussion of the statute in *Hutto*, provide reasonable grounds for anticipating the treatment of fees "as part of the costs".

Finally, there is no important policy to be furthered by applying the rule retroactively, and there are significant policies embodied in Section 1988 which will be subverted by denying fees to prevailing plaintiffs and their counsel who acted in reliance on the plain language of the statute. If the First Circuit rule is adopted, it should be applied only to cases in which judgment is entered subsequent to the publication of this Court's opinion.

Conclusion

For all the above reasons, the decision of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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